APPENDICES

OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

FILED

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Clerk, United States
Court of Appeals
Tenth Circuit

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1882

CAPTAIN LEWIS T. MOORE, Appellant, v. JAMES R. SCHLESINGER, Secretary of Defense; DR. JOHN L. McLUCAS, Acting Secretary of the Air Force, GENERAL JOHN D. RYAN, Air Force Chief of Staff; LT. GENERAL A. P. CLARK, Superintendent of the Air Force Adademy;	Appeal From The United States District Court For The District of Colorado (D.C. #Civ.5152)

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THROUGH

BRIG. GENERAL WILLIAM T. WOODYARD, Dean of Faculty, U.S.A.F. Academy; COL. ROBERT G. TAYLOR, Professor and Head of Department of Geography, U.S.A.F. Academy; LT. COL. HARRY W. EMRICK, Associate Professor of Geography, U.S.A.F. Academy,

Appellees.

William F. Reynard, American Civil Liberties Union Foundation of Colorado, Inc., Denver, Colorado (Robert Tabor Booms, Denver, Colorado, with him on the Brief), for Appellant.

Captain Bruce Clark, U.S.A.F., Litigation Division, Office of the Judge Advocate General, Washington, D.C. (James L. Treece, United States Attorney, and Gary M. Jackson, Assistant United States Attorney, with him on the Brief), for Appellees.

Before LEWIS, Chief Judge, SETH and McWILLIAMS, Circuit Judges.

PER CURIAM.

At the time this litigation was initiated, appellant was a Captain in the United States

Air Force. He had been a commissioned officer in the regular Air Force since 1966, when he was graduated from the Air Force Academy. In 1970, he was assigned for a four-year tour of duty to the faculty of the Academy in the Department of Geography. Of the ten Officer Effectiveness Reports accomplished on appellant since his initial duty assignment in 1966, five had rated him as "exceptionally fine" and fine as "outstanding." In February 1973, appellant wrote various members of Congress expressing his views on policies at the Academy. On March 13, 1973, appellant was advised by his supervising officer appellee, Colonel Robert G. Taylor, that the Academy administration was aware of those letters but that no adverse action would be taken as a result of them.

On March 23, 1973, more than a year prior to the expiration of his tour to the faculty, appellant was called out of his classroom and was relieved of duty as an instructor by appellees Taylor and Lieutenant Colonel Harry W. Emrick. The reason given later was lack of motivation to pursue an Air Force wide career, which lack led to an inability to motivate the cadets in his classes. Appellee Taylor ordered appellant to see the Staff Psychiatrist at the Academy, and ordered appellant to have no further contact with the cadet wing. In April, 1973, appellant was temporarily detailed to Ent Air Force Base, and in June he was permanently reassigned to Offutt Air Force Base, Nebrasks. Some time earlier, appellant had initiated a complaint under Article 138 of the Uniform Code

of Military Justice, requesting redress of grievances relating to matters here in controversy. The request was denied by appellant's commanding officer, appellee Taylor, and later by the officer exercising general court-martial jurisdiction over Taylor, appellee Clark. The action was subsequently reviewed and approved by the authorized designee of the Secretary of the Air Force.

At about that same time, appellant filed this action seeking a declaratory judgment, injunctive relief, relief in the form of mandamus, and a writ of habeas corpus to reverse his reassignment to Offutt and order his reinstatement as an instructor at the Academy. He further sought damages for violation of his constitutional right to freedom of expression. The United States District Court for the District of Colorado denied appellant's motion for preliminary injunctive relief and later ordered the case dismissed for lack of jurisdiction over the subject matter. Thereafter, and while this appeal was pending, appellant received an overseas assignment. On May 15, 1975, appellant voluntarily submitted his resignation from all appointments in the Air Force to be effective September 1, 1975. This resignation was submitted the last day of an extension granted appellant by the Air Force to decide whether he wished to accept that overseas assignment. The office of the Secretary of the Air Force accepted appellant's resignation, and he was ordered discharged. Separation orders were issued effective September 1, 1975.

Oral argument in this case was heard by this court on the day after appellant's resignation became effective. The resignation by appellant is such a change of status as to significantly alter the remedies available to him and these proceedings. Since appellant is no longer a member of the Air Force, the courts cannot grant him the interservice remedies he requested in his complaint. Appellant cannot be reassigned to the Academy as an instructor, no mandamus or habeas corpus relief is appropriate, and a declaratory judgment would no longer affect the rights of the litigants. The situation is not capable of repetition, nor is it evading review by its nature. Instead appellant by his own action caused the issue here to become moot. The First Amendment challenge to the military's power to reassign raised by appellant in this action is no longer a controversy capable of resolution by this court in the form of interservice remedies, and as to these remedies the case is rendered moot. See DeFunis v. Odegaard, 416 U.S. 312.

The only remedy that could survive appellant's resignation is his damage claim for violation of his constitutional right. Appellant alleges his termination as an instructor and subsequent transfer from the Academy were punitive, retaliatory measures taken in response to his exercise of his First Amendment privilege in writing to Congress. It has been recognized that ". . . citizens in uniform may not be stripped of basic rights simply because

they have doffed their civilian clothes," as stated by former Chief Justice Earl Warren and quoted by this court in Kennedy v. Commandant, U.S. Disciplinary Barracks, 377 F.2d 339 (10th Cir.). Another court has held that persons do not lose their First Amendment rights by joining the armed forces. Cortright v. Resor, 447 F.2d 245 (2d Cir.). Rather, that court asserted that ". . . right . . . should be preserved to the maximum extent possible, consistent with good order and discipline and national security . . . [and] the effectiveness of the unit." When a soldier's fundamental rights are involved, the test becomes one of balancing military demands against individual freedoms. Carlson v. Schlesinger, 364 F.Supp. 626 (D.C.). Only when military actions are so restrictive of a soldier's fundamental rights as to deny them altogether and thus constitute an abuse of the broad discretion granted to military officers in their command will the court be said to have jurisdiction to review the merits of such a dispute.

In this case, the recognition of appellant's constitutional right must be weighed against the traditional policy of judicial noninterference in military duty assignments. Oroloff v. Willoughby, 345 U.S. 83; Noyd v. McNamara, 378 F.2d 538 (10th Cir.). The record indicates the allegations are not sufficient to allow this court to interfere with the authorized exercise of discretion by Air Force officials and entertain jurisdiction over the dispute. The lower court in its dismissal order states that ". . . assuming the truth of all

the factual allegations made by Captain Moore, there is no adequate showing of such an abuse of discretion as to warrant interference by a civilian court." This demonstrates the analysis made by the trial court was correct under the authorities. It shows that no abuse of discretion is asserted in the facts alleged, sufficient to establish jurisdiction. The threat to First Amendment freedom, as appellant presents it here, does not justify judicial interference in a matter involving military discretion.

Even if the court had found sufficient grounds to justify intervention, there are other defects in the jurisdiction asserted by appellant. Jurisdiction is not established under section 1985 of the Civil Rights Act, as that section is inapplicable by its own terms. Nor can appellant establish jurisdiction under 28 U.S.C. § 1331, the general federal question category. To maintain his action under this section, appellant must satisfy the amount in controversy requirement. Lynch v. Household Finance Corp., 405 U.S. 538. His transfer from duty at the Academy did not affect his rank or salary. Further, there is a general prohibition against suing federal officers who are acting within the scope of their authority. Bethea v. Reid, 445 F.2d 1163 (3d Cir.). Although in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, the United States Supreme Court allowed Bivens' claims against federal agents for violation of his Fourth Amendment rights, that case has been narrowly read and itself recognizes the immunity

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of officials who are performing discretionary acts exercising discretionary authority. Appellant has failed to establish jurisdiction of his claim.

It is unclear just what jurisdictional basis appellant claims in asking for judicial review of the Article 138 proceeding conducted in his behalf. The court has no power to review administrative rulings by courts-martial and military commissions as is clear from the section 701(b)(1)(F) exemption to the Administrative Procedures Act. Cortright v. Resor, 447 F.2d 245 (2d Cir.). The trial court correctly treated the motion of appellees for summary judgment as one to dismiss. Thompson v. United States, 291 F.2d 67 (10th Cir.).

Mootness as to certain requested measures of relief, a long-standing policy of judicial noninterference in military matters requiring discretion, and otherwise defective jurisdictional allegations all require the court to hold that no cause of action is alleged, and no adequate allegations of jurisdiction has been made.

AFFIRMED.

OPINION OF THE UNITED STATES DISTRICT

FILED
United States District Court
Denver, Colorado

OCT 29 1974

JAMES R. MANSPEAKER
By _____ Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-5152

CAPTAIN LEWIS T. MOORE,
510-46-9657FR

Plaintiff,

v.

JAMES R. SCHLESINGER, Secretary of Defense; DR. JOHN L. McLUCAS, Acting Secretary of the Air Force; GENERAL JOHN D. RYAN, Air Force Chief of Staff; LT. GENERAL A. P. CLARK, Superintendent of the Air Force Academy; BRIG. GENERAL WILLIAM T. WOODYARD, Dean of Faculty, U.S.A.F. Academy; COL.

ROBERT G. TAYLOR, Professor and Head of Department of Geography, U.S.A.F. Academy; LT. COL. HARRY W. EMRICK, Associate Professor of Geography, U.S.A.F. Academy,

Defendants.

William F. Reynard of Reynard, Dorward & Booms, P.C., 719 University Building, Denver, Colorado, 80202, for plaintiffs; James L. Treece, United States Attorney, 323 United States Courthouse, Denver, Colorado 80202 and Bruce E. Clark, Captain, USAF, Office of The Judge Advocate General, Washington, D.C. 20314, for defendants.

MEMORANDUM AND ORDER

MATSCH, Judge

The following is a statement of uncontroverted facts from a pre-trial order entered herein on March 15, 1974:

> "The Plaintiff is a Captain in the United States Air Force and is presently assigned at Offutt Air Force Base, Nebraska. Plaintiff has been a commissioned officer in the regular Air Force since 1966. In 1970 he was assigned for a tour to the faculty of the Air Force

Academy in the Department of Geography. Of the ten Officer Effectiveness Reports accomplished on plaintiff since his initial duty assignment in 1966, five have rated him as "exceptionally fine" and five as "outstanding." In February 1973, Plaintiff wrote various members of Congress. On March 13, 1973, Plaintiff was advised by the defendant Taylor that the administration of the Academy was aware of the letters to Congress but that no adverse action would be taken as a result of them. The Plaintiff was removed from his position as an instructor on 23 March 1973 by Colonel Robert G. Taylor and Lt. Colonel Harry W. Emrick. On 27 March 1973 defendant Taylor ordered Plaintiff to see the Staff Psychiatrist at the Air Force Academy. On 29 March 1973, defendant Taylor ordered the Plaintiff not to have contact with the cadets. On 10 April 1973 the plaintiff was ordered by the defendant Emrick not to perform duties as a timer in Academy track meets. The Plaintiff initiated a complaint under Article 138, Uniform Code of Military Justice, requesting redress of grievances relating to matters here in controversy. In June, 1973, the request for redress was denied by the Plaintiff's commander, the defendant Taylor, and later by the officer exercising general court-martial jurisdiction over Taylor, the defendant Lt. General A. P. Clark,

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> The action was subsequently reviewed and approved by the authorized designee of the Secretary of the Air Force."

The judge presiding at that pre-trial conference granted the defendants an opportunity to file a motion for a summary judgment "directed to the jurisdictional aspects of the case" and within the time set by that order the defendants did file such a motion seeking a summary judgment for defendants for a lack of jurisdiction. That motion is now before the Court and it is to be considered as a motion to dismiss for a lack of jurisdiction over the subject matter of the plaintiff's claims for relief.

By this complaint, the plaintiff requests relief by way of a declaratory judgment that his removal from a teaching assignment at the Offutt Air Force Base were wrongful and were violative of his constitutional rights; that he is entitled to money damages; that he is entitled to injunctive relief by mandamus and he has petitioned for a writ of habeas corpus. Additionally he seeks judicial review of the denial of relief on his complaint under Article 138, Uniform Code of Military Justice.

The essential allegations that the administrative actions taken by the defendants, who are or were officers superior to the plaintiff in the chain of command, were in retaliation for the plaintiff's exercise of First Amendment rights and constituted an intimidation and a conspiracy to restrict and limit those rights.

The plaintiff urges jurisdiction of his claim for damages in 28 U.S.C. 1331. While defendants contend that there can be no showing of damages exceeding $10,000.00, it is assumed that the jurisdictional amount is present in this case. The theory of damage liability is not a general tort theory but an alleged violation of 42 U.S.C. 1985(1), which provides, in pertinent part:

> "(1) If two or more persons in any state or territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof. . ."

the party injured or aggrieved may have an action for the recovery of damages occasioned thereby. The statute does not appear applicable by its own terms. Moreover, it has regularly been held that federal officers acting under color of federal law are immune from suit under this statute. Bethea v. Reid, 445 F.2d/ 1163 (3rd Cir. 1971), Williams v. Halperin, 360 F.Supp. 554 (S.D. N.Y. 1973).

It is argued, though, that there is a right to recover damages directly under the Constitution as recognized in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). In that case the Supreme Court majority did find a cause of action for damages caused by an un-

reasonable search and seizure. The interpretation of that opinion made by the Court of Appeals, Second Circuit in Bivens v. Six Unknown Agents, 456 F. 2d 1339 (1972) is informative here. Against the historical background and within the context of the other cases on immunity and discretion of federal officers discussed at length in that opinion, it must be concluded that the Bivens doctrine should be limited to Fourth Amendment rights and it is not applicable here.

In my view, there is no jurisdiction in this Court to grant relief in damages for the acts alleged in the plaintiff's complaint.

The remainder of the relief requested is to request interdiction of the military orders and cause a reassignment of the plaintiff to his former duty station. There is no jurisdiction to do so. This is not a proper petition for habeas corpus under 28 U.S.C. 2241 because the plaintiff does not seek release from the military service and it has been held that the writ is not appropriate for review of military duty assignments. Orloff v. Willoughby, 345 U.S. 83 (1953).

The plaintiff contends for mandamus, 28 U.S.C. 1361, to compel performance of a duty owed to him under the First Amendment and under 10 U.S.C. 1034 which provides as follows:

> "No person may restrict any member of an armed force in communicating with a

member of Congress, unless the communication if unlawful or violates a regulation necessary to the security of the United States."

In Cortright v. Resor, 447 F.2d 245 (2nd Cir. 1971), the court assumed jurisdiction under § 1361 to rescind a military transfer alleged to have been made in retaliation for the exercise of First Amendment rights; but the district court's order was reversed because the facts failed to show an abuse of the broad discretion granted to military officers in their commands. Assuming the truth of all of the factual allegations made by Captain Moore, there is no adequate showing of such an abuse of discretion as to warrant interference by a civilian court.

There is finally the question of a judicial review of the denial of relief in the Article 138 proceedings. It is urged that the procedure followed was inadequate and procedurally invalid. There is no statutory authority for a civilian court review of these administrative proceedings and they are expressly excluded from the Administrative Procedures Act, 5 U.S.C. 701(b)(F). To characterize the question as judicial review is to add nothing to the jurisdictional questions already discussed.

The plaintiff's request for convening a three-judge court under 28 U.S.C. 2282 was denied previously because nothing in the

complaint seeks to enjoin the operation on execution of any statute as unconstitutional.

Upon the foregoing, it is

ORDERED that the complaint and this cause of action are dismissed.

Done at Denver, Colorado, this 29th day of October, 1974.

BY THE COURT:

Richard P. Matsch, Judge
United States District Court